JOHN E. SCHREIBER (261558)
WINSTON & STRAWN LLP
333 S. Grand Avenue #3800
Los Angeles, CA 90071-1543
Telephone: (213) 615-1700
Facsimile: (213) 615-1750
Email: jschreiber@winston.com

JEFFREY L. KESSLER (*pro hac vice*)
A. PAUL VICTOR (*pro hac vice*)
GEORGE E. MASTORIS (*pro hac vice*)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-6700
Facsimile: (212) 294-4700
Email: jkessler@winston.com

Attorneys for Plaintiffs
HARMONI INTERNATIONAL SPICE, INC. AND
ZHENGZHOU HARMONI SPICE CO., LTD.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HARMONI INTERNATIONAL SPICE, INC., a California corporation, and ZHENGZHOU HARMONI SPICE CO., LTD., a corporation,

Plaintiffs,

v.

WENXUAN BAI, an individual, et al.,

Defendants.

Case No. 2:16-cv-00614-BRO-ASx

Hon. Beverly Reid O'Connell

PLAINTIFFS' *EX PARTE* APPLICATION FOR CLARIFICATION OF ORDER; OR, IN THE ALTERNATIVE, FOR AN EXTENSION OF TIME TO AMEND THE COMPLAINT AS TO DEFENDANT BAI

[Filed Concurrently with Declaration of George E. Mastoris; and [Proposed] Order]

TO THE COURT, DEFENDANTS AND ALL ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to Local Rule 7-19 Plaintiffs Harmoni International Spice, Inc. ("Harmoni") and Zhengzhou Harmoni Spice Co., Ltd. ("Zhengzhou Harmoni") (collectively, "Plaintiffs") hereby request clarification from the Court regarding its order on Plaintiffs' Motion to Alter or Amend or, in the alternative, request that the Court extend the time for Plaintiffs to file an amended complaint as to Defendant Wenxuan Bai ("Bai"). This request is made on an *ex parte* basis due to the pending deadline to file any amended complaint on or by February 27, 2017. *See* ECF No. 183 (Stipulation for Extension of Time); ECF No. 181 (Court's Order on Plaintiffs' Motion to Alter or Amend, or the "Order").[1]

Good cause exists to grant this *ex parte* request. In particular, although the Court's Order utilizes language characterizing its prior order granting Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint ("Dismissal Order") as a "final judgment on the merits" for purposes of considering Plaintiffs' Motion to Alter or Amend under Fed. R. Civ. P. 59, Plaintiffs understand that there is currently no final *appealable* judgment under Fed. R. Civ. P. 54(b) because the Dismissal Order, ECF No. 163, adjudicated fewer than all of the claims and the parties, including, for example, those claims as to Defendant Bai, which were dismissed only on the grounds of improper service of process and without prejudice. *See* Dismissal Order at 35; Fed. R. Civ. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). While acknowledging the clear language of Rule 54(b), in an abundance of caution, Plaintiffs seek the Court's clarification that its Dismissal Order was not a final appealable Order within the meaning of Rule 54(b).

[1] The Order originally contemplated a deadline of February 13, 2017 to file an amended complaint with respect to to Defendant Bai. Order at 19. Plaintiffs and Defendant Bai timely entered a stipulation extending the deadline to February 27, 2017. ECF No. 183.

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In the alternative, should the Court determine that the Order *is* a final appealable judgment, Plaintiffs would have until February 27, 2017 to file their notice of appeal—the same date as the deadline to file an amended complaint as to Defendant Bai. Accordingly, Plaintiffs respectfully request that the Court extend the deadline to file an amended complaint as to Defendant Bai until thirty (30) days after a final ruling on Plaintiffs' appeal of the Dismissal Order or until the deadline for Plaintiffs to file a notice of appeal regarding the Dismissal Order has passed without Plaintiffs choosing to file such notice. As explained below, granting that extension would enhance judicial efficiency and economy, while resulting in no prejudice to Defendant Bai. By contrast, being required to file an amended complaint as to Defendant Bai at this time would be prejudicial to Plaintiffs.

Federal Rule of Civil Procedure 6(b) provides that when "by order of court an act is required . . . to be done within a specified time, the court for cause shown may at any time in its discretion . . . order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by previous order." Fed. R. Civ. Proc. Rule 6(b). "Cause shown" for purposes of Rule 6(b) has been generally interpreted as synonymous with a showing of "good cause," which is subject to a relaxed judicial standard. *See* *Poe v. Cristina Copper Mines, Inc.*, 15 F.R.D. 85, 88 (D.C. Del. 1953). Indeed, requests for extensions of time pursuant to Rule 6(b) may "always" be asked for, and are liberally granted if timely made. *See* *Creedon v. Taubman*, 8 F.R.D. 268, 269 (N.D. Ohio 1947).

Good cause is present here because Plaintiffs' request is timely made and an extension will promote judicial economy and efficiency for all parties involved. Plaintiffs' intended appeal of the Dismissal Order has three potential outcomes. The Ninth Circuit Court of Appeals could: (i) affirm the Court's finding that the allegations set forth in the Second Amended Complaint (the "SAC") do not adequately plead a RICO violation, and that the SAC was appropriately dismissed with prejudice; (ii) affirm the Court's holding that the allegations were insufficient

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under Rule 12(b)(6) but reverse the Court's holding that dismissal with prejudice was appropriate, at which point Plaintiffs could amend their allegations against *all* Defendants, including Defendant Bai and the other Chinese Defendants (currently being served with the SAC), in one operative amended complaint; or (iii) hold that Plaintiffs' SAC sufficiently pled a RICO violation, at which point Plaintiffs would continue to try to serve the SAC on Defendant Bai and the other Chinese Defendants through the Hague Convention while the case proceeds against the other Defendants. Accordingly, rather than file and attempt to serve a (potentially unnecessary) amended complaint now as to Defendant Bai and the other Chinese Defendants—which, because the Hague Convention is involved, is a very expensive proposition—while the case as to the other Defendants is in limbo, it serves judicial economy to wait for the Ninth Circuit Court of Appeals' decision and proceed on a uniform basis with regard to all Defendants.

Proceeding in this manner would not prejudice Defendant Bai. First, as things currently stand, Mr. Bai has not yet been served with an operative complaint. Declaration of George E. Mastoris ("Mastoris Decl.") ¶ 3. Were Plaintiffs required to file a Third Amended Complaint now and if they are successful in serving Mr. Bai in short order, he would have to incur the expense of responding while the appeal is pending. If, on the other hand, the relief requested is granted, Mr. Bai would be free from this case while the appeal runs its course and, depending on how the Ninth Circuit rules, may never have to face any future allegations from Harmoni. Although his counsel will no doubt disagree, that seems significantly better for Mr. Bai. Second, if (as is more likely), it takes a significant amount of time to serve Mr. Bai in China pursuant to the Hague Convention, whether or not an amended complaint is filed now or following the Ninth Circuit Court of Appeals' decision will make no difference as to the case schedule. Based on Plaintiffs' experience with the foreign defendants in this case, service is likely to take a minimum of 9-10 months (as it is apparent that Mr. Bai does not intend to accept service voluntarily, even though he is

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now being represented by the same counsel as the U.S. Defendants). *Id.* ¶ 4.

Furthermore, if this request is not granted, Plaintiffs will suffer substantial prejudice in at least two different ways. First, Plaintiffs would be forced to file an amended complaint at this time when it is possible that the Ninth Circuit Court of Appeals finds the allegations as set forth in the Second Amended Complaint are sufficient. Plaintiffs would be forced to incur the expense of serving a new complaint on Defendant Bai pursuant to the Hague Convention in addition to the expenses already incurred in starting the process of serving the Second Amended Complaint against Defendant Bai and the other Defendants in China, a time-intensive and expensive process costing tens of thousands of dollars. Second, if the Ninth Circuit Court of Appeals grants Plaintiffs leave to amend, Plaintiffs could be forced to litigate motions to dismiss in three waves: once against Defendant Bai, once against any reinstated Defendants, and once against other foreign Defendants. In addition to being grossly inefficient, this would impose a very significant burden on Plaintiffs, who have already been driven to the brink of bankruptcy by Defendants' conduct.

Moreover, as demonstrated in the accompanying Declaration, the facts in this case are still rapidly developing, demonstrating that Plaintiffs' allegations in the SAC are true and providing support for additional allegations regarding predicate acts and proximate cause. Indeed, this is the main reason why Mr. Bai and his lawyers are so eager to put an end to this action now even when it appears to be against his short-term financial interests to do so.

For example, Avrum Katz—formerly a defendant in this case—recently filed a letter with the Department of Commerce asking it to reconsider its decision to initiate anti-dumping review proceedings of Zhengzhou Harmoni and confirming that the Defendants in this case engaged in the "fraudulent and misleading scheme" alleged by Harmoni in its SAC. Mastoris Decl., Ex. A at 1. Mr. Katz's letter states that he was "intentionally misled by Mr. Hume about what was really going on" and did not know that, among other things, Mr. Hume was trying to destroy Harmoni and receiving

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$100,000 from his Chinese clients to seek American farmers to file a review request against Plaintiffs. *Id.* at 2. Contrary to what Mr. Hume and the other Defendants told the Commerce Department (but again consistent with Plaintiffs' allegations in the SAC), Mr. Katz also confirms that the "review request against Harmoni came, in substance and form, from Chinese businessman Jack Bai and Wang Ruopeng" (both Defendants named in the SAC) and that "Hume and his Chinese clients used [Katz and Crawford] as pawns in a game [they] did not understand." *Id.* at 3.

Unsurprisingly, Mr. Crawford and Mr. Hume responded to and denied most (but not all) of Mr. Katz's claims. Mr. Katz submitted a second, more detailed letter, attaching a number of exhibits confirming his account, including emails between himself and other Defendants regarding the payments they received from Chinese garlic companies in exchange for filing a review request. Mastoris Decl., Ex. B. Further corroboration of his claims (and the allegations in the SAC) came from Ms. Cynthia Ferebee-Medina, former office manager of Hume & Associates LLC, Mr. Hume's firm and Mr. Katz and Mr. Crawford's counsel in proceedings before Commerce. In a declaration that was also submitted to Commerce, Ms. Medina provides support for many of Mr. Katz's allegations, including that Mr. Hume was "using [Mr. Katz and Mr. Crawford] to push the agenda of several Chinese companies that Mr. Hume represented and that are competitors of Harmoni." Mastoris Decl., Ex. C at p. 15 ¶ 2. Again, and in direct contravention to statements made by Mr. Hume to Commerce, the legal fees he charged in connection with his representation of Mr. Katz and Mr. Crawford in Commerce were apparently paid by Chinese companies. (Ms. Medina also suggests that Defendants' fees in *this* case are being paid by those same companies, notwithstanding the fact that the invoices produced were addressed to Mr. Hume). *Id.* ¶ 7. Finally, Ms. Medina states that she "has reason to believe that Mr. Hume destroyed" electronic correspondence between Defendants Mr. Crawford and Mr. Wang after Defendants' counsel in this matter attempted to collect them as part of the discovery process (prior to the Dismissal Order). *Id.* ¶ 8. Mr. Crawford, of

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course, informed Plaintiffs in his response to their Request For Production No. 4 that no such documents existed, a statement which appears to be false. Mastoris Decl., Ex. D.[2]

Plaintiffs also have suffered brand new (and extremely serious) injuries as a direct result of new fraudulent statements made by Defendants or their proxies. For example, this past fall, U.S. Customs & Border Protection was falsely informed by Defendants or their agents that Harmoni used prison labor to process the garlic it imports to the United States. Mastoris Decl. ¶ 9. As a result, Customs put a hold on Harmoni's shipments of garlic and refused to release many thousands of kilos of garlic for over a month, during which time it sat rotting at the dock. *Id.* Although those claims were eventually exposed as baseless and the garlic was released by Customs, much of it was by that time spoiled and unsalvageable—directly costing Harmoni hundreds of thousands of dollars in lost profits. *Id.* In light of these damning facts, which are highly relevant to the allegations in Harmoni's action and continue to develop on an almost daily basis, it is manifestly in the interest of justice to grant Plaintiffs the extension they are seeking. That way, after an appeal is heard, those facts and others can be added to any amended complaint.

This request is properly before the Court on an *ex parte* basis because the earliest regularly noticed Motion would be March 27, 2017, over a month away, while the court-imposed deadline for Plaintiffs to amend the complaint is February 27, 2017.

Plaintiffs met and conferred with counsel of record for Defendant Bai, Anthony Lanza and Brodie Smith of Lanza and Smith PLC, via telephone on February 8, 2017 and again on February 23, 2017. Mastoris Decl. ¶ 10. Counsel indicated that Defendant Bai does not oppose the request for clarification as to whether an appeal is currently ripe but does oppose the alternative relief (of an extension of time to file an amended complaint until after any ripe appeal has run its course) sought in this

[2] Ms. Medina's declaration does not imply, and Plaintiffs have no reason to believe, that Defendants' attorneys in this case had any knowledge of the alleged destruction of documents; rather, Mr. Hume appears to have been responsible.

Request. *Id*. Plaintiffs will be serving Defendant Bai's counsel with this Application and supporting papers by e-mail. Defendant Bai shall thus have until the next court day (Friday, February 24) to submit his papers in opposition to this Application. The names, addresses, and telephone numbers of the relevant Defendant's counsel are as follows:

Anthony Lanza Brodie Smith Lanza and Smith PLC 3 Park Plaza Suite 1650 Irvine, CA 92614-8540 Telephone: 949-221-0490 Fax: 949-221-0027 Email: tony@lanzasmith.com Email: brodie@lanzasmith.com	*Counsel for Defendant Wenxuan Bai*

This request is based upon this *Ex Parte* Application, the Declaration of George E. Mastoris, all pleadings, papers and orders on file in this action, all matters of which this Court may take judicial notice, and such other evidence and argument as the Court may request.

Dated: February 23, 2017

WINSTON & STRAWN LLP

By: /s/ *John E. Schreiber*
John E. Schreiber
Jeffrey L. Kessler
A. Paul Victor
George E. Mastoris

Attorneys for Plaintiffs HARMONI INTERNATIONAL SPICE, INC. and ZHENGZHOU HARMONI SPICE CO., LTD.

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333 S. Grand Avenue
Los Angeles, CA 90071-1543